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In the
Supreme Court of the United States

JOSEPH MASSARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. A FEDERAL CRIMINAL DEFENDANT, WHOSE NEW APPELLATE COUNSEL FAILS TO RAISE A CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ON DIRECT APPEAL, SHOULD NOT BE PROCEDURALLY BARRED FROM ASSERTING THAT CONSTITUTIONAL CLAIM IN A HABEAS CORPUS PROCEEDING BROUGHT PURSUANT TO 28 U.S.C. § 2255

A. The Procedural Default Rule Should Not Be Applied to Claims Asserting the Ineffective Assistance of Trial Counsel

The Solicitor General now argues for the adoption of the Second Circuit's severe rule which imposes a procedural bar against the presentation of Sixth Amendment claims in a § 2255 proceeding where the defendant was represented by new counsel on appeal and the claim was fully developed on the record, unless the defendant can establish cause and actual prejudice for the failure of appellate counsel to raise the ineffectiveness issue on direct appeal.

However, in an unbroken line of cases, stretching over a long history of our federal and state courts, it has been recognized that ineffective assistance claims are more properly brought in a collateral proceeding, rather than on direct appeal (United States Br. 18 n.7; Pet. Br. 21 n.20). Such claims, predicated on the Sixth Amendment, are

normally exempt from any requirement that they be raised on direct appeal because they are fundamentally distinct from any other form of trial error.[1]

Ineffectiveness claims are treated differently because they almost always require factual development outside of the trial record. And, unlike evidentiary rulings or other judicial determinations, trial courts rarely issue opinions on counsel's performance that would aid the court of appeals in reviewing a Sixth Amendment claim.[2] Therefore, unless there has been a *hearing* before the trial court on counsel's ineffectiveness, there is frequently no decision on the issue and the matter is not truly preserved, in the conventional sense, for appellate review.[3]

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[1] Significantly, since *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984), the Solicitor General consistently advocated that "a defendant can attack the actual performance of trial counsel *only* through a petition for post-conviction relief under 28 U.S.C. § 2255, and not through direct appeal" (emphasis supplied). *See Billy-Eko v. United States*, 509 U.S. 901 (1993); *Diaz-Albertini v. United States*, 498 U.S. 1061 (1991); *Chappell v. United States*, 494 U.S. 1075 (1990). The government's brief contains no explanation for this change of position.

[2] Trial courts are in the "best position to make findings related to both the quality of trial counsel's performance and the impact of any shortfalls in that representation." *United States v. Mala*, 7 F.3d 1058, 1063 (1st Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994); *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (*en banc*) (in a collateral proceeding "counsel accused of deficient performance can explain their reasoning and actions, and the district court can render its opinion on the merits of the claim"); *see also Commonwealth v. Grant*, No. 57 WAP 2001, 2002 WL 31898393, *7 (Pa. Dec. 31, 2002).

[3] The Supreme Court of Nevada employs a clear-cut approach whereby ineffective assistance of counsel claims can only be raised on direct appeal if there has already been an *evidentiary hearing*. *Feazell v. State*, 906 P.2d 727, 729 (Nev. 1995); *Gibbons v. State*, 634 P.2d 1214 (Nev. 1981).

Similarly, even if the *facts* that give rise to an ineffectiveness claim may appear on the record, the *reasons* for counsel's actions are hardly ever developed.[4] Thus, the court on direct appeal is forced to speculate as to the basis for counsel's conduct.[5]

Furthermore, this Court previously recognized that "[i]n general, no comparable, meaningful opportunity exists for the full and fair litigation of a habeas petitioner's ineffective-assistance claims at trial and on direct review." *Kimmelman v. Morrison*, 477 U.S. 365, 378 n.3 (1986). Therefore, merely because the issue may have been identified during the trial proceedings does not mean that it was fully and fairly *litigated*.

In sum, ineffective assistance of counsel claims are, in essence, *collateral* claims, separate from the underlying facts of a conviction, and are properly addressed in collateral proceedings. Thus, a defendant should never be barred from presenting a Sixth Amendment claim in a collateral proceeding merely because that issue was not raised on direct appeal.

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[4] *See Galloway*, 56 F.3d at 1240; *People v. Mendoza Tello*, 933 P.2d 1134, 1136 (Cal. 1997) (no procedural bar should apply because a court should not "brand a defense attorney incompetent unless it can be truly confident all the relevant facts have been developed"); *People v. Alvarado*, 683 N.Y.S.2d 501, 502 (N.Y. App. Div. 1st Dept. 1998) (ineffectiveness claim required a collateral proceeding "since this claim is based on facts *dehors* the record and counsel has had no opportunity to explain his strategy").

[5] The Solicitor General calls this Court's attention to the Seventh Circuit's questionable presumption on direct appeal that trial counsel acted for tactical reasons (United States Br. 31 n.15, citing *United States v. Trevino*, 60 F.3d 333, 338 (7th Cir. 1995), *cert. denied*, 516 U.S. 1061 (1996)). However, in the absence of a complete record the court of appeals should not presume that counsel acted for strategic reasons — this is especially true when the trial attorney's *omissions* are at issue.

B. The Considerable Experience of Most State Courts and Federal Circuit Courts Argues Against the Second Circuit's Procedural Default Rule

The vast weight of federal authority does not support the Second Circuit's rule. In fact, ten circuit courts of appeals do not bar ineffectiveness claims that are first brought in post-conviction proceedings. Nevertheless, the Solicitor General invites this Court to look at decisions from selected states to support its suggestion that "application of the procedural default rule to ineffective assistance claims is not unworkable and does not entail an unwarranted burden on judicial administration" (United States Br. 35). However, the highest courts of at least thirty-five states similarly do *not* preclude defendants from first raising ineffectiveness claims in post-conviction proceedings.[6] Thus, a study of the experiences of most other states leads to the opposite conclusion than that suggested by the Solicitor General.

Notably, many of the states with the largest populations, and, logically, criminal justice systems that produce the most ineffectiveness claims, subscribe to the collateral

[6] The Solicitor General's research reveals only two circuit courts and sixteen state supreme courts that apply a procedural default rule to ineffective assistance of counsel claims (United States Br. 19, 36 n.18). As discussed later in this brief, since the government filed its brief, the Supreme Court of Pennsylvania abandoned the procedural default rule. *Commonwealth v. Grant*, No. 57 WAP 2001, 2002 WL 31898393 (Pa. Dec. 31, 2002). And, it appears that the Seventh Circuit is developing serious misgivings about that rule. *See, e.g., United States v. Woolley*, 123 F.3d 627, 634 (7th Cir. 1997) (discouraging ineffectiveness claims on direct appeal because such claims can waste the court's judicial resources).

review rule.[7] For example, the Supreme Court of California holds that "the rules generally prohibiting raising an issue on habeas corpus that was, or could have been, raised on appeal would not bar an ineffective assistance claim on habeas corpus." *People v. Mendoza Tello*, 933 P.2d 1134, 1135 (Cal. 1997).[8]

And, significantly, states that had previously required ineffectiveness claims to be presented at the earliest possible moment, are now revisiting that issue and adopting the collateral review rule based on their experience. In *Commonwealth v. Grant*, No. 57 WAP 2001, 2002 WL 31898393, *8 (Pa. Dec. 31, 2002), the Supreme Court of Pennsylvania, in a radical reversal of position, adopted the rule that ineffectiveness claims should be brought in collateral proceedings and cannot be barred based upon a failure to raise the claim on direct appeal — even though the claim may have been eligible for direct appellate review.[9]

[7] The Supreme Courts of the most populous states (California, Texas, New York and Florida) have never endorsed a procedural default doctrine for ineffectiveness claims (United States Br. 36 n.18).

[8] California reported the largest number of arrests in 2000 and leads the nation in habeas corpus petitions filed in district courts pursuant to 28 U.S.C. § 2254. U.S. Department of Justice, Bureau of Justice Statistics Sourcebook of Criminal Justice Statistics Online, available at http://www.albany.edu/sourcebook/1995/pdf/t45.pdf; *Federal Habeas Corpus Review : Challenging State Court Criminal Convictions*, U.S. Department of Justice, Office of Justice Programs at 9 (Sept. 1995). And, ineffectiveness claims constituted 25% of all issues in habeas corpus petitions sampled as part of the National Center for State Courts' study in 1995. *Id.* at 14.

[9] The recent Pennsylvania Supreme Court decision calls into question any suggestion that state courts are finding procedural default in a "growing number of cases" (United States Br. 36 n.18, citing Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Defaults,*

For more than twenty-five years the State of Pennsylvania labored under a strict rule of procedural forfeiture, similar to the Second Circuit's rule, which required defendants to raise trial counsel's ineffectiveness when new counsel was obtained or else those claims were deemed waived. 2002 WL 31898393, *8. However, the Pennsylvania Supreme Court finally recognized that deferring review of ineffectiveness claims until the collateral review stage of the proceedings "offers a petitioner the best avenue to effect his Sixth Amendment right to counsel." *Id.* That high court also concluded that the "administration of justice will be served" since the collateral review rule "provides a clearer and more concise standard for both courts and the parties to follow." 2002 WL 31898393, *9.[10]

Habeas Reform, and Claims of Ineffective Assistance of Counsel, 99 Colum. L. Rev. 1103, 1128 (1999)). The more recent experience of courts reveals a continued preference for the collateral review rule. *See, e.g., State v. Spreitz*, 39 P.3d 525, 526 (Ariz. 2002); *State v. Elison*, 21 P.3d 483, 488-89 (Idaho 2001); *State v. Fraser*, 608 N.W.2d 244, 250 (N.D. 2000); *Robinson v. State*, 16 S.W.3d 808, 809 (Tex. Crim. App. 2000); *Ware v. State*, 759 A.2d 764, 793 (Md. 2000), *cert. denied*, 531 U.S. 1115 (2001).

[10] At least nine states, including Arizona and Virginia, require ineffectiveness claims to be raised in a collateral proceeding, and will not even consider them on direct appeal. *State v. Spreitz*, 39 P.3d 525 (Ariz. 2002); *Roach v. Commonwealth*, 468 S.E.2d 98, 105 n.4 (Va. 1996), *cert. denied*, 519 U.S. 951 (1996); *see also Champion v. State*, 908 P.2d 454, 470 (Alaska Ct. App. 1995); *Jackson v. State*, 654 A.2d 829, 832 (Del. 1995); *Lawrence v. State*, 691 So.2d 1068, 1074 (Fla. 1997), *cert. denied*, 522 U.S. 880 (1997); *State v. Nichols*, 698 A.2d 521, 522 (Me. 1997); *State v. Hurt*, 931 S.W.2d 213, 214 (Mo. Ct. App. 1996); *State v. Malstrom*, 672 A.2d 448, 450 (R.I. 1996); *State v. Kornahrens*, 350 S.E.2d 180, 184 (S.C. 1986), *cert. denied*, 480 U.S. 940 (1987).

New Hampshire and New York are among the states that permit, but do not require, ineffectiveness claims to be raised on direct appeal. *See, e.g., Humphrey v. Cunningham*, 584 A.2d 763, 766 (N.H. 1990) (although ineffectiveness claim could have been raised on direct appeal, a defendant may raise the issue on collateral attack if he can

One of the justices stressed that the court's "substantial experiences with the deficiencies and unintended consequences" of the procedural bar rule required correction. 2002 WL 31898393, *16 n.1 (Castille, J., concurring and dissenting).

C. Defendants Will Be Prejudiced If Appellate Attorneys Are Compelled to Raise Ineffectiveness Claims on Direct Appeal

In our opening brief we demonstrated the hazards confronting appellate counsel when forced to decide whether an ineffectiveness claim should be asserted on direct appeal or risk procedural default (Pet. Br. 27). For example, a defendant's Sixth Amendment claim that appears in the record but is raised prematurely may be resolved forever without the benefits of an amplified record. However, the Solicitor General suggests that this dilemma "should not often arise in practice" (United States Br. 32). But this very dilemma was a source of major concern to the National Association of Criminal Defense Lawyers ("NACDL") and the National Association of Federal Defenders ("NAFD"), which are in a far

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establish a harmful constitutional error); *People v. Brown*, 382 N.E.2d 1149, 1149 (N.Y. 1978) ("in the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding"); *Woods v. State*, 701 N.E.2d 1208, 1220 (Ind. 1998), *cert. denied*, 528 U.S. 861 (1999)(if not raised on direct appeal, a Sixth Amendment claim of ineffective assistance of trial counsel may be presented in post-conviction proceedings); *see also State v. Pugsley*, 911 P.2d 761 (Idaho 1995); *State v. Hernandez*, 686 So. 2d 92, 94 (La. Ct. App. 1996); *Hunt v. State*, 583 A.2d 218, 227 (Md. 1990), *cert. denied*, 502 U.S. 835 (1991); *State v. Sparano*, 592 A.2d 608, 613 (N.J. Super. Ct. App. Div. 1991); *State v. Bengson*, 541 N.W.2d 702, 703 (N.D. 1996); *State v. Pettypool*, 676 P.2d 368, 368-69 (Or. 1984); *State v. McGill*, 536 N.W.2d 89, 94 (S.D. 1995).

better position to judge these matters based upon the experience of more than 28,000 members.[11] In addition, jurists have acknowledged the problem as well.[12]

The Solicitor General also indicates that the standard for determining when a claim is sufficiently developed is "not *unduly* ambiguous or unworkable" (United States Br. 32) (emphasis supplied). This, of course, recognizes that there are *some* ambiguities concerning when an issue is fully developed on the record to qualify for appellate review.[13] The confusion caused by this approach is evidenced by the significant number of defendants who have been forced to seek refuge in this Court on this very issue.[14]

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[11] The NACDL has 10,000 members nationwide — joined by 80 state and local affiliate organizations that total 28,000 members (NACDL Br. 1). The NAFD's membership includes attorneys of Federal Defender offices (NACDL Br. 1). In 1998, members of a Federal Defender organization represented 30.1% of all defendants in felony cases terminated in district courts. Caroline Wolf Harlow, *Bureau of Justice Statistics Special Report : Defense Counsel in Criminal Cases*, Table 2 (Nov. 2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf.

[12] *See, e.g., Guinan v. United States*, 6 F.3d 468, 476 (7th Cir. 1993) (Easterbrook, J., concurring) ("the inevitable loss will prevent the accused from raising the same claim later, when factual development would permit accurate resolution").

[13] As noted in *Billy-Eko v. United States*, 8 F.3d 111, 115 (2d Cir. 1993), the Solicitor General previously agreed that "adopting this limitation on the general exception for ineffective assistance claims might confuse defendants and attorneys in the future."

[14] *See, e.g., Moghal v. United States*, No. 95-9027, 519 U.S. 835 (1996); *Velasquez v. United States*, No. 95-6925, 516 U.S. 1160 (1996); *Sprecher v. United States*, No. 95-82, 516 U.S. 913 (1995); *Diaz-Albertini v. United States*, No. 90-552, 498 U.S. 1061 (1991); *Chappell v. United States*, No. 89-1040, 494 U.S. 1075 (1990). This list is illustrative only and by no means exhaustive. There is no way to calculate how many other defendants' Sixth Amendment claims have been lost because of this procedural trap.

The Solicitor General suggests that with ineffective assistance claims the "analysis of prejudice merges with the prejudice prong of the underlying claim on the merits" (United States Br. 21-22, 31). However, even if the prejudice components are identical, which is disputed, the Second Circuit's approach produces an odd result because the court must "evaluat[e] the merits of the case to determine whether [it] should evaluate the merits. Nothing productive is accomplished." *United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995) (*en banc*). Therefore, pursuant to the Second Circuit rule, a petitioner cannot even obtain a hearing under § 2255 on an ineffectiveness claim without first proving the very prejudice that could only be developed through a hearing.[15]

Finally, the experience of various courts, including the Seventh Circuit, reveals that "a defendant who presents an ineffective-assistance claim for the first time on direct appeal has little to gain and everything to lose." *United States v. Trevino*, 60 F.3d 333, 338 (7th Cir. 1995).

D. Finality of Judgment Should Not Dictate a Default Rule Which Has Serious Practical Drawbacks and Undermines Sixth Amendment Values

Although the Solicitor General still concedes that our concerns over the procedural bar rule "have force" (United States Br. 10), and acknowledges that the "bright-line rule" previously advocated by the government would "have certain advantages" (United States Br. 15),

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[15] 28 U.S.C. § 2255 provides that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon."

the government now suggests that "on balance" requiring ineffectiveness claims to be raised on direct appeal "serves the general societal interest in respecting the finality of criminal judgments and encouraging resolution of legal challenges to convictions at the earliest feasible opportunity" (United States Br. 10).[16] However, society's interest in the "finality" of criminal judgments should not override the majority approach which allows a defendant to obtain a hearing on a Sixth Amendment claim.

The Court of Appeals for the Tenth Circuit, sitting *en banc*, noted that concerns relating to finality and other considerations do not justify the burdens and hardships caused by application of the procedural bar doctrine to ineffectiveness claims. *Galloway*, 56 F.3d at 1241. This is because the doctrine will, inevitably, result in further claims that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal. 56 F.3d at 1242. Finality is not, in

[16] *Bousley v. United States*, 523 U.S. 614 (1998), relied upon by the Solicitor General, involved a guilty plea, rather than a trial. Of course, "the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." 523 U.S. at 621, quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979). This is, in part, because the impact of any "inroad on the concept of finality" is "greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." *Timmreck*, 441 U.S. at 784.

practice, achieved through the Second Circuit's rule which also leads to piecemeal presentation of ineffectiveness claims.[17]

Judicial experience reveals that "the prejudicial effect of trial counsel's chosen course of action is determined more accurately after the trial and appellate courts have had the opportunity to review the alleged claims of error and if necessary, correct any trial court errors. It is after this review that the full effect of counsel's conduct can be placed in the context of the case." *Commonwealth v. Grant*, No. 57 WAP 2001, 2002 WL 31898393, *8 (Pa. Dec. 31, 2002).[18] As the Pennsylvania Supreme Court recently observed,

> we have learned that time is necessary for a petitioner to discover and fully develop claims related to trial counsel ineffectiveness. Deferring review of trial counsel ineffectiveness claims until the collateral

[17] *See, e.g., Riascos-Prado v. United States*, 66 F.3d 30, 35 (2d Cir. 1995) (the Second Circuit's rule sometimes necessitates bringing ineffectiveness claims on *both* direct appeal and § 2255 proceedings); *see also United States v. Woolley*, 123 F.3d 627, 634 (7th Cir. 1997) (ineffectiveness claims on direct appeal are discouraged, in part, because the bringing of such claims "can result in a waste of a court's judicial resources, as we often examine an appellant's ineffective assistance arguments, only to conclude that the record is insufficient for us to even rule on whether the record is sufficient to establish the appellant's claim").

[18] This, in fact, is precisely what happened in Petitioner's case. The prejudice of trial counsel's failures did not initially become evident until the Second Circuit issued its decision finding that "Massaro's rejection of a continuance supports our conclusion" that Massaro was not substantially prejudiced by the government's delay in advising the defense of the bullet and "Massaro's decision to proceed with his strategy despite his knowledge that the bullet might be matched to existing shell fragments weakens his claim" (Pet. App. 36-37).

review stage of the proceedings offers a petitioner the best avenue to effect his Sixth Amendment right to counsel. *Id.*

Furthermore, the Solicitor General cites to *United States v. Frady*, 456 U.S. 152, 166 (1982), and *Murray v. Carrier*, 477 U.S. 478, 491 (1986), to support its "finality of judgment" claim (United States Br. 14 n.5, 23). However, both of those cases were decided *before* the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which imposes a one-year limitation on motions made pursuant to 28 U.S.C. § 2255. This statute of limitations advances finality in criminal proceedings and restricts the filing of successive § 2255 motions (United States Br. 30 n.14).[19] Thus, recent statutory limitations eliminate the concern in *Frady* of a "series of endless postconviction collateral attacks." 456 U.S. at 164-65.

Lastly, as properly observed by *amici*, claims of "finality" should not detract from this Court's determination of what approach provides the most "regular, orderly method" of presenting and resolving ineffectiveness claims (NACDL Br. 15, citing *Sunal v. Large*, 332 U.S. 174, 181-82 (1947)). Rules of procedure "should be designed to induce litigants to present their contentions to the right tribunal at the right time. For ineffective assistance, the court of appeals on direct appeal is the wrong tribunal at the wrong time." *United States v. Woolley*,

[19] In *Duncan v. Walker*, 533 U.S. 167, 178-79 (2001), this Court reversed the Second Circuit and concluded that part of A.E.D.P.A.'s purpose was to further the principle of finality and to reduce the potential for delay on the road to finality.

123 F.3d 627, 634 (7th Cir. 1997), quoting *Guinan v. United States*, 6 F.3d 468, 476 (7th Cir. 1993) (Easterbrook, J., concurring).

The collateral review doctrine (1) presents a bright-line rule that provide attorneys and courts with certitude as to when specific claims must be raised; (2) allows for a complete development of the record relating to the facts and circumstances underlying the ineffectiveness claim; (3) provides trial lawyers with an opportunity to be heard before any determination is made as to whether or not they were ineffective; (4) ensures that the district court has an opportunity to pass on *all* ineffectiveness claims before their presentation to an appellate court; (5) avoids time-consuming litigation over procedural issues of "cause and prejudice"; and (6) enables defendants to better assess the consequences of counsel's conduct. Against this host of compelling considerations, the Solicitor General leans only the notion of finality.[20] However, concerns of finality must give way to the higher value, recognized by a majority of federal and state courts, of allowing a defendant to obtain a fair hearing on an ineffectiveness claim.

[20] The Solicitor General still recognizes that the accepted collateral review rule "is straightforward to administer, and avoids the expenditure of judicial resources on applying the cause-and-prejudice standard to ineffectiveness claims, with the goal of identifying that set of claims that could fairly be raised and resolved on direct appeal" (United States Br. 15).

II. THE COURT OF APPEALS ERRONEOUSLY DENIED PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

A. Cause Exists for Any Failure to Present Petitioner's Ineffectiveness Claim on Direct Appeal

As indicated above, the Second Circuit's procedural forfeiture rule should not be applied to bar the presentation of a Sixth Amendment claim in a collateral proceeding. However, even if that radical approach is applicable, Petitioner established cause for the failure to raise the ineffectiveness issue on direct appeal and prejudice resulting therefrom.

Petitioner's opening brief demonstrated that the *prejudice* from trial counsel's refusal to accept a continuance and to properly investigate the newly discovered bullet evidence did not become apparent until after Petitioner's direct appeal was concluded (Pet. Br. 32).[21] The decision of the Second Circuit, on direct appeal, alerted the defense to the damage caused by trial counsel's conduct (Pet. App. 36-37), and the subsequent investigation of three experts revealed serious questions relating to the bullet's connection to the Fiorito homicide (J.A. 150). This constituted "cause" for why the ineffectiveness claim was not raised on direct appeal.

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[21] To prevail on an ineffectiveness claim, the defendant must show that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The Solicitor General claims that the experts' affidavits "add nothing of significance to the trial record on whether counsel's failure to accept a continuance caused prejudice to Petitioner" (United States Br. 40). However, Petitioner's forensic experts concluded that the bullet's involvement in the murder must be viewed with "great suspicion" and "it is highly unlikely that the projectile recovered from the automobile is, in truth, connected with the shooting" (J.A. 149-50).[22] The experts also indicated that further investigation was required (J.A. 150, 151, 175). And, Petitioner showed that any failure on the part of the defense to have its experts examine the bullet was because of the extremely limited access provided by the government.[23]

The facts presented by these experts — which are outside of the record from the direct appeal — support a conclusion that, at the very least, a hearing is warranted into these substantial claims and that this issue is properly presented under the auspices of a § 2255 motion.

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[22] The government tries to impugn the importance of the bullet but it was *conceded* on appeal that the bullet was "the most important" evidence in the trial (J.A. 137). Its importance is magnified by the fact that the NYPD ballistics laboratory could not match the shell casing found in the car to the bullet (J.A. 42, 50).

[23] Contrary to the government's contention that Petitioner did not pursue further examination of the bullet evidence or seek a court order (United States Br. 41 n.20), the defense expressly sought an order which would allow Petitioner's experts to examine the bullet and fragments (A.C.A.77,80; J.A. 175). The district judge never granted that application and, instead, dismissed the § 2255 motion on procedural grounds without conducting a hearing (Pet. App. 16-26).

B. Prejudice Results From Any Failure to Present the Ineffectiveness Claim on Direct Appeal

The Solicitor General endeavors to merge the prejudice component of an ineffectiveness claim under *Strickland v. Washington*, 466 U.S. 668 (1984), with the prejudice required to excuse a procedural default under *United States v. Frady*, 456 U.S. 152 (1982). However, as discussed above, a defendant should not be forced to prove the merits of his case to obtain a hearing under 28 U.S.C. § 2255.

Regardless, the affidavits of Petitioner's experts reveal that there is more than a reasonable probability that the result at trial would have been different had trial counsel accepted the continuance and fulfilled his professional obligations to investigate the issues surrounding the sudden appearance of the wayward bullet (Pet. Br. 11-13). This is especially true in light of the peculiar facts of this case, which involve the mysterious discovery of a bullet, on the eve of trial, in a car that had been thoroughly searched several times by police officials (Pet. Br. 34-35). The evidence against Petitioner was *far* from overwhelming, the murder weapon was never recovered, and no fingerprints or bloody clothing ever linked Petitioner to the homicide.

A hearing is also required to investigate defense counsel's preoccupation with the financial costs that he would personally incur by prolonging the proceedings (J.A. 19, 25). Moreover, counsel conceded that he failed to investigate evidence relating to the discovery of the bullet because he was too busy (J.A. 66). These profound issues warrant further factual development and highlight the prejudice to Petitioner's constitutional rights.

Finally, the enduring prejudice in this case is that Petitioner is now suffering a life sentence but no court has ever reviewed the merits of his Sixth Amendment claim — even though the court of appeals concluded that counsel's failure to accept a continuance weakened Petitioner's claims (Pet. App. 37). Under these circumstances, the Second Circuit's procedural default rule was improperly applied.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded for a hearing on the merits of Petitioner's Sixth Amendment claim.

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Respectfully submitted,

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